SUPREME COURT, U. S.

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No. 904

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA,

Petitioner,

v.

TRINITY UNIVERSAL INSURANCE COMPANY and
FIRST NATIONAL BANK IN DALLAS

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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For the purpose of this memorandum, respondents adopt the statements contained in the Government's petition under the headings "Opinions Below," "Jurisdiction," "Question Presented," and "Statement," except that respondents show that the opinion is unofficially reported in 382 F. 2d 317.

ARGUMENT

I. The decision of the court below is plainly correct.

The decision of the court below states better than respondents can hope to these fundamental principles of law upon which it rests, and which no court has ever questioned:

1. The retainage is a security for the benefit of the surety who performs the contract.

In Prairie State Bank,[1] this court said:

"* * * the reserved per cent, to be withheld until the completion of the work to be done is as much for the

[1] Prairie State National Bank v. United States (1896) 164 U.S. 277, 17 S. Ct. 142, 41 L. Ed. 412.

> indemnity of him who may be a guarantor of the performance of the contract as for him for whom it is to be performed."

More than 65 years later, this Court in Pearlman[2] noted its adherence to Prairie State Bank and reaffirmed the principle that "a surety who completes the contract has an equitable right to indemnification out of the retained fund."

The court below properly applied the elementary rule that an obligee may not divert security for the surety's obligation to the satisfaction of debts for which the surety is not bound.

> ***2. The obligee in a performance bond cannot, by application of the retainage to a debt for which the surety is not liable, require the surety to complete the work at a price less than that agreed upon.***

In Munsey Trust, (332 U.S. at 244) this Court said:

> "But when a job is incomplete, the Government must expend funds to get the work done, and is entitled to claim damages only in the amount of the excess which it pays for the job over what it would have paid had the contractor not defaulted."

The court below stated in this connection:

> "If the government can set off the amount of the unpaid taxes when the surety has completed the job, the surety would be forced to work for less than the contract price. An equity court should attempt to avoid such an unfair result." (Appendix to the Petition, page 13, note 8.)

[2] 371. U.S. 132, 138 (1962)

Respondents submit that to allow the obligee to setoff does more than create a mere inequity or unjust result. It empowers an obligee to create a new contract requiring the surety to complete construction at a price less than that agreed upon. It violates fundamental principles of contract law and of the law of damages.

II. Standard Accident Insurance Co. v. United States, (1951) 97 F. Supp. 829, did not challenge, and certainly did not refute, the basic principles applied by the court below.

Standard Accident merely ignores basic principles; and in so doing is justly subject to the succinct criticism which was noted by the court below, (App. Pet. p. 14, n. 9):

> "Such reasoning is clearly erroneous in light of (1) the express declaration of Munsey granting the surety superiority where there exists a sound basis of subrogation, (2) the accepted principle of equitable subrogation to the rights of the Government where the surety has benefited the Government by assuming the contractor's duty to pay damages, Prairie State Bank v. United States, 164 U.S. 227 (1896); Hardin County Sav. Bank v. United States, 65 F. Supp. 1017 (Ct. Cl. 1946), and (3) Munsey's explicit recognition of the rule regarding diversion of security, 332 U.S. at 243."

III. The petition for certiorari does not challenge the correctness of the principles upon which the decision of the lower court is based.

The petition is based upon the following:

1. The naked assertion of the Solicitor General that there is no difference of substance between claims arising through

performance bonds and payment bonds. But there is no attempt to show wherein the court below and this court in Munsey Trust were in error in making a distinction.

2. The out-of-the-record statement that the United States has routinely exercised the right of setoff with the acquiescence of the surety.

Respondents suggest that the paucity of the decisions on the precise point indicates, not an acquiescence in the position asserted by the Government, but rather an avoidance of the issue by refusing to complete the construction and allowing the Government to proceed. As shown by what this court said in Munsey Trust, the Government, in any suit against the surety, would have to account for the entire contract price, and not the contract price less what the contractor might otherwise owe the United States.

At any rate, the Government cannot by its own actions establish a rule of law binding on any court.

3. The declaration that "to give the surety priority constitutes a windfall clearly not contemplated by the surety at the time of its initial undertaking."

The innumerable cases in which sureties have vigorously asserted their rights to the retainage in the courts of the United States and all of the states of the Union for the more than 70 years since Prairie State Bank refutes the statement that sureties do not contemplate the security of the retainage.

IV. It is manifest that the decision of the court below is correct. But if in the opinion of this Court a denial of the writ of certiorari is likely to increase litigation or result in any uncertainty which should be put at rest, then it is suggested that in view of the clarity of the issues decided by the court below, it would be appropriate for the court to grant the certiorari and summarily affirm the decision of the court below.

CONCLUSION

The petition for certiorari should be denied, or, in the alternative, the writ should be granted and the decision below summarily affirmed.

Respectfully submitted,

LLOYD E. ELLIOTT,
Attorney for Respondents.

CERTIFICATE OF SERVICE

I, L. E. Elliott, do hereby certify that on this date there was deposited in a United States mail box, with airmail postage prepaid, addressed to Erwin N. Griswold, Solicitor General, United States Department of Justice, Washington, D. C. 20530, five (5) copies of the foregoing Brief in Response to Petition for Writ of Certiorari.

This the .... day of December, 1967.

L. E. Elliott